



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC - 1 2011

REPLY TO THE ATTENTION OF:
WW-16J

Mr. James M. Townsend, Chief, Regulatory Branch
U.S. Army Corps of Engineers, Louisville District
P.O. Box 489
Newburgh, Indiana 47629-0489

Subject: Public Notice LRL-2010-124; Sun Energy Group, LLC, Hilsmeier #2 Mine

Dear Mr. Townsend:

The U.S. Environmental Protection Agency has reviewed the subject Public Notice and the permit application dated September 22, 2011. Sun Energy Group, LLC, proposes to impact 12,581 linear feet of ephemeral streams, 5,240 linear feet of intermittent streams, 0.12 acre of palustrine forested wetlands, 0.83 acres of palustrine scrub-shrub wetlands, 3.14 acre of palustrine emergent wetlands and 14.28 acres of open water in order to surface mine coal 2.5 miles east of the city of Stendal, Pike County, Indiana. The streams onsite are unnamed tributaries to Rock and Cup Creeks, in the Patoka River Watershed. Overall, approximately 40% of the mitigation site property has been disturbed through previous mining in this area along with timbering (approximately 37% of the streams, 100% of the forested wetlands, 100% of the scrub/shrub wetlands, 44% of the emergent wetlands, and 52% of the open water impact areas are located in previously mined and disturbed areas). EPA offers the following comments based on the review of the application and Public Notice.

Permit application and alternatives analysis

The permit requirements under section 404 of the Clean Water Act (CWA) require the applicant to provide enough detail in the application to facilitate a determination of compliance with section 404(b)(1) Guidelines.¹ The applicant provided a map of the mining operations plan that includes information about the location of diversion ditches, top soil/overburden stockpiles, coal haulage and access roads, mining sequence, previously mined areas, and location of sediment ponds to further support their alternatives assessment and efforts at avoidance and minimization. Additional clarification regarding the mining operations maps, avoidance and minimization, and mitigation was provided through conversations with Sun Energy Group's Permitting and Reserve Development Technician. Due to the fact that the site is a re-mine area, the applicant expressed some uncertainty about the type and amount of impacts that will occur to streams and wetlands throughout the mining process. The current mining operations plan depicts less direct impacts to streams and wetlands in the north and west central portions of the site than what is currently proposed in the application. Sun Energy considered the aquatic resources in these portions of the

¹ 40 C.F.R. § 230

site as impacted resources since secondary, indirect impacts are possible. EPA requests the Corps keep us informed of any changes to the proposed stream and wetland impacts in the current application as well as any resulting changes that might have on the proposed mitigation.

Mitigation, Monitoring, and Performance Standards

The applicant proposes to mitigate for all stream impacts at a 1:1 ratio. Wetland impacts are proposed to be mitigated at varying ratios and will be dependent on the type of wetland impacted (i.e. a 3:1 ratio for forested wetland, a 2:1 ratio for scrub/shrub, 1.5:1 ratio for emergent wetlands). Further, the applicant will replace all jurisdictional open waters onsite at a 1:1 ratio. EPA requests that a special condition be included in the permit which stipulates that in order for the mitigation to be considered successful, the mitigation areas shall, at a minimum, demonstrate appropriate biological communities are present in the reconstructed streams through direct biological sampling. Further, EPA requests that a range of values be established for EPA's Rapid Bioassessment Protocol parameters and be included as part of the mitigation performance criteria. EPA also requests a 10 year monitoring period for the forested wetlands due to the slow development of these ecosystems.

Short and long-term management

The applicant proposes to provide site protection through the establishment of a protective easement in coordination with the Corps. EPA requests the opportunity to review this agreement once it is finalized in order to determine if it sufficiently ensures long term site protection. This protective instrument should be established in advance of, or concurrent with, the authorized impacts.

Financial assurances, long-term management and adaptive management should be addressed in more detail before the Section 404 permit is issued. Currently, the applicant proposes to be responsible for all mitigation activities post mining; however the applicant does not provide information regarding the funding mechanisms to be put in place to ensure that the compensatory mitigation work will be successfully completed in accordance with applicable performance standards. Financial assurances for compensatory wetland and stream mitigation for 404 purposes are separate and distinct from those required by the Surface Mining Control and Reclamation Act. While the issuance of the 404 permit does commit Sun Energy to ensuring successful mitigation, the 404(b)(1) guidelines require financial assurances in the form of performance bonds, escrow accounts, casualty insurances, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments.² EPA requests the Corps work with the applicant to address appropriate financial assurances in a Clean Water Act Section 404 context. EPA continues to request that the financial assurances be established before the 404 permit is issued and include specific details on the dollar amount, type(s) of assurance, release conditions, and be made payable to a designee of the Corps or a standby trust agreement.

² 40 C.F.R. §230.93(n)(2)

An adaptive management plan needs to be developed that outlines potential problems that may be encountered during reclamation of the site and their proposed solutions.³ In addition, procedures must be established for identifying, reporting, and implementing remedial actions according to specific timelines, in the event they are necessary. The general discussion about adaptive management in the application assumes that issues will be handled as they arise. A greater level of pre-planning is needed to instill confidence that any remedial actions will be conducted appropriately and in a timely manner. EPA requests the applicant create an adaptive management plan to include the anticipated response to any potential shortcomings of the mitigation design (i.e. additional plantings would be installed if survival rate drops below specified threshold, and additional mitigation needed if stream biology or habitat decline).

Sun Energy Group plans on turning over management of the site after reclamation to the current landowners and notify them that aquatic resources on site are jurisdictional waters of the United States and subject to permitting requirements by the Army Corps of Engineers. This is not sufficient to cover the long term management of the site in perpetuity. The applicant must develop a plan describing how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long term financing mechanisms.⁴ The long term management plan should include a description of long term management needs and annual cost estimates for these needs, and should identify the funding mechanism that will be used to meet those needs. The provisions necessary for long-term financing must be addressed in the permit. EPA continues to request that a long term management plan be established before the 404 permit is issued, and that it include specific details on individuals designated to manage the site long term and funding mechanisms to cover potential long term management costs.

Environmental Justice

EPA is committed to protecting human health and the environment for everyone and ensuring that all people are treated fairly and given the opportunity to participate meaningfully in EPA's decision-making process. In addressing the existing statutory provisions set forth under Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," (February 11, 1994)⁵ we continue to focus our attention on the adverse environmental and human health effects of federal actions on minority and low-income communities with the goal of achieving environmental protection as well as promoting nondiscrimination in federal programs affecting human health and the environment.

An EPA assessment tool which incorporates environmental, human health, compliance and social demographics metrics revealed that a majority of the proposed Charger Mine site is located within a potential environmental justice area of concern. E.O. 12898 directs all federal agencies to conduct programs, policies, and activities in a manner that ensures (1) communities in and around the proposed site are not being subject to disproportionately high and adverse human health or environmental impacts and (2) such activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations)

³ 40 C.F.R. § 230.97(c)

⁴ 40 C.F.R. § 230.94(c)(11), 230.97(d)

⁵ <http://www.epa.gov/fedreg/eo/eo12898.htm>

the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin. EPA recommends that the Corps consider designating the proposed mine site an Environmental Justice area of concern prior to a permit decision and take steps to avoid any adverse human health or environmental effects this mine may have on minority populations and low-income populations. We recommend the Corps examine potential impacts such as contamination of drinking water supplies, impacts on fish and wildlife, air quality and noise impacts from the proposed project.

EPA requests the Corps of Engineers consider our comments before issuing this permit. Please notify us of Sun Energy Groups' response to these comments and any changes to the permit application. We appreciate the opportunity to provide additional comments on this project. Please contact Kerryann Weaver (312-353-9483) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Swenson".

Peter Swenson, Chief
Watersheds and Wetlands Branch

cc: Sam Werner, CELRL-OP-FW, Corps of Engineers (via email)

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